

2014 ABQB 426
Alberta Court of Queen's Bench

Hoard, Re

2014 CarswellAlta 1205, 2014 ABQB 426, [2014] A.W.L.D. 3827, [2014] W.D.F.L. 3708, 243 A.C.W.S. (3d) 15

In the Matter of the Bankruptcy of Graham Charles Hoard

Reg. J.L. Mason

Heard: July 10, 2014

Judgment: July 15, 2014

Docket: Calgary B101-653252

Counsel: Craig McMahon, for Hardie & Kelly, trustee, for the estate of Graham Hoard
Elizabeth Toerper, for herself

Subject: Estates and Trusts; Family; Insolvency; Property; Restitution

Related Abridgment Classifications

Bankruptcy and insolvency

[VIII](#) Property of bankrupt

[VIII.5](#) Trust property

[VIII.5.a](#) General principles

Headnote

Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles

In bankruptcy situation, creditors who benefit from failure of trust claim are not "enriched", but merely recover what they are owed according to pro rata distribution requirements set out in Bankruptcy and Insolvency Act — Property sought to be impressed with constructive trust in order to right wrongful conduct must be that property obtained through wrongful act — While constructive trust, if appropriately established, could have effect of beneficiary receiving payment out of funds which would otherwise become part of estate of bankrupt divisible among creditors, constructive trust, otherwise unavailable, cannot be imposed for that purpose.

Table of Authorities

Cases considered by *Reg. J.L. Mason*:

Barnabe v. Touhey (1995), 1995 CarswellOnt 1167, 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477 (Ont. C.A.) — considered

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1997), (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)*) 214 A.R. 380, 6 C.B.R. (4th) 188, 1997 CarswellAlta 1182 (Alta. Q.B.) — considered

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)*) 216 A.R. 328, (sub nom. *Bassano Growers Ltd. v. Diamond S*

Produce Ltd. (Bankrupt) 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199, 1998 ABCA 198 (Alta. C.A.) — referred to

Credifinance Securities Ltd., Re (2011), 74 C.B.R. (5th) 161, 2011 ONCA 160, (sub nom. *DSL Capital Corp. v. Credifinance Securities Ltd.*) 277 O.A.C. 377, 2011 CarswellOnt 1218 (Ont. C.A.) — referred to

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, (sub nom. *Luscar Ltd. and Norcen v. Pembina Resources Ltd.*) 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251, 1994 ABCA 356 (Alta. C.A.) — referred to

McKinnon, Re (2006), 2006 NBQB 108, 2006 CarswellNB 158, 19 C.B.R. (5th) 253, 300 N.B.R. (2d) 395, 782 A.P.R. 395 (N.B. Q.B.) — referred to

Melchior v. Cable Estate (2007), 65 B.C.L.R. (4th) 165, 30 C.B.R. (5th) 123, 2007 BCSC 136, 2007 CarswellBC 164 (B.C. S.C.) — referred to

New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2007), 2007 CarswellBC 1323, 34 C.B.R. (5th) 94, (sub nom. *New Skeena Forest Products Inc., Re*) 2007 G.T.C. 1547 (Eng.), [2007] G.S.T.C. 78, 2007 BCSC 808 (B.C. S.C.) — considered

Ontario (Director, Real Estate & Business Brokers Act) v. NRS Mississauga Inc. (2003), 2003 CarswellOnt 1239, 49 E.T.R. (2d) 256, 40 C.B.R. (4th) 127, 8 R.P.R. (4th) 13, 226 D.L.R. (4th) 361, 64 O.R. (3d) 97, (sub nom. *Director of Real Estate and Business Brokers v. NRS Mississauga Inc.*) 170 O.A.C. 259 (Ont. C.A.) — referred to

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — followed

Toerper v. Hoard (2011), 2011 ABQB 85, 2011 CarswellAlta 194 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 38 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 3.37 — considered

APPEAL by claimant from trustee in bankruptcy's rejection of her proprietary/constructive trust claim.

Reg. J.L. Mason:

Introduction

1 Elizabeth Toerper and Graham Hoard contractually share commissions flowing from insurance and investment contracts held in Mr. Hoard's name alone. Mr. Hoard did not pay Ms. Toerper her full share and in 2011, Ms. Toerper obtained a judgement for damages for breach of contract against Mr. Hoard. After the judgment, Ms. Toerper learned Mr. Hoard had transferred a significant portion of the contracts to another licensed insurance agent, Shawna Brackley, for apparently no consideration. Ms. Toerper commenced an action against Ms. Brackley for her share of the commissions from the transferred contracts. In August of 2012, Mr. Hoard made an assignment in bankruptcy. Hardie & Kelly Inc. is the trustee of his estate.

2 Ms. Toerper is now seeking redress for the transfer to Ms. Brackley in the bankruptcy. She submits that due to Mr. Hoard's wrongful transfer of a portion of the contracts, she should get his share of commissions paid on the remaining contracts to Mr. Hoard's trustee in bankruptcy, in addition to her own share. The trustee rejected Ms. Toerper's proprietary claim to Mr. Hoard's share of the commission payments. Ms. Toerper appeals the trustee's decision. She relies on her affidavit sworn April 28, 2014 in support of the application.

3 For the reasons that follow, the appeal is dismissed.

History of Ms. Toerper's claim

4 Ms. Toerper commenced action 0801 05424 against Mr. Hoard, his numbered company and Ms. Brackley. The following review of the litigation is largely drawn from the reasons of Justice Strehkaf dated February 15, 2011 [[2011 CarswellAlta 194](#) (Alta. Q.B.)].

5 The action arose out of agreements entered into by the parties in 2006 relating to the acquisition of insurance and investment "books of business", consisting of an entitlement to future remuneration in the form of trailer fees and various commissions. The parties did not divide the underlying insurance and investment contracts, but rather agreed to share the whole of the cash flow arising under those contracts, held exclusively in Mr. Hoard's name.

6 On March 15th, 2006, Ms. Toerper and Mr. Hoard together paid \$125,000 to acquire in equal shares a "book of business" from a Gary Phillips.

7 On December, 29, 2006, Ms. Toerper purchased a 50% interest in Mr. Hoard's "book of business".

8 Ms. Toerper paid \$50,000 to acquire this interest.

9 Her interest was subject to fees payable to Mr. Hoard's numbered company that would administer the payments. Mr. Hoard or his numbered company were to receive the payments, deduct the administrative fees and pay Ms. Toerper her share.

10 Ms. Toerper became concerned that Mr. Hoard and his numbered company were breaching their contractual obligations under the agreements in numerous ways, including by not providing her the required monthly statements or the revenue to which she was entitled, and by transferring accounts to other parties without her consent.

11 The action was commenced September 8, 2008. Mr. Hoard and his numbered company defended the action but the defence was eventually struck by order of Justice Stevens on June 11, 2010.

12 In late January, 2011, Justice Strehkaf presided over a two- day *vive voce* damages assessment hearing pursuant to Rule 3.37. Both Ms. Toerper and Mr. Hoard presented witnesses.

13 Justice Strehkaf issued reasons on February 15, 2011. She held that Mr. Hoard and his numbered company breached their obligations to Ms. Toerper under the agreements. She was not satisfied that Ms. Toerper had alleged a sufficient factual basis in her amended statement of claim to establish claims for breach of trust or breach of fiduciary duty that went beyond the claims for breach of contract and accordingly, granted no relief on those bases.

14 She quantified the damages for breach of contract at approximately \$260,000, to and including December 9, 2009. She accepted Ms. Toerper's interpretation of the agreements that she was entitled to a 50% interest in all commissions, except first year commissions from new clients who were not clients of Mr. Hoard at the time of contracting.

15 Also included in these damages was approximately \$8000.00, representing Ms. Toerper's share of commissions from clients given to Ms. Brackley without Ms. Toerper's consent, contrary to section 9.2 of the December 29, 2006 agreement. Ms. Brackley had initially been named as a defendant in the action but Ms. Toerper subsequently discontinued the action against her prior to the assessment hearing.

16 Justice Strehkaf also declared that Ms. Toerper was entitled to damages after December 31, 2009, to be calculated in accordance with the agreements. She declined to award general damages for estimated future loss of business.

17 Following the damages assessment and in the course of enforcing the judgment, Ms. Toerper learned that Mr. Hoard had in fact transferred further contracts to Ms. Brackley for apparently no consideration, in January of 2010.

18 In a document entitled "Assignment of Responsibility — Name Change Agreement", Mr. Hoard assigned his right to represent clients holding life insurance and investment contracts he had placed with Industrial Alliance Insurance and Financial Services Inc. and/or Industrial-Alliance Pacific Life Insurance Company. Over 100 are listed in an attachment to this document. It provides that the assignment covers all commissions, bonuses or other compensation payable by the two companies relative to the client contracts placed by Mr. Hoard with them.

19 There are further such Assignments to Ms. Brackley that are not in evidence, but which the trustee concedes took place.

20 The trustee accepts that Ms. Toerper is entitled to 50% of the net commissions it has received and will receive from the various insurance companies who continue to pay commissions to Mr. Hoard. The balance of the commissions form part of Mr. Hoard's estate.

21 Ms. Toerper wants to go beyond her 50% share and dip into Mr. Hoard's 50% share collected by the trustee to the exclusion of the other unsecured creditors, on the basis that Mr. Hoard wrongly transferred away some of the contracts to Ms. Brackley prior to bankruptcy without her consent.

22 She presented this argument to Registrar Prowse, who directed Ms. Toerper to come back with authority supporting her position. Her counsel briefed the issue and submits that Mr. Hoard's share of the commissions are subject to a constructive trust in favour of Ms. Toerper. The trustee asserts that the circumstances do not support the imposition of a constructive trust.

Imposition of constructive trust

23 The onus of proving a constructive trust falls upon the claimant and, in a bankruptcy setting, is not lightly undertaken. The evidence must be clear and the standard of proof is high. Given that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 provides a code by which legislators have balanced the interests of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust: *McKinnon, Re*, 2006 NBQB 108 (N.B. Q.B.).

24 The remedy is discretionary and the authorities have expressed reservations as to the availability of a constructive trust where creditors and third party interests are affected: see for example, *McKinnon, Re; Melchior v. Cable Estate*, 2007 BCSC 136 (B.C. S.C.).

25 Ms. Toerper submits that pursuant to the Supreme Court of Canada decision in *Soulos v. Korkontzilas* (1997), 46 C.B.R. (3d) 1 (S.C.C.), there are two possible bases upon which to impose a constructive trust in this case: unjust enrichment and wrongful conduct.

Unjust enrichment

26 A constructive trust can be utilized to remedy unjust enrichment, which is established where: there is an enrichment; a corresponding deprivation; and an absence of juristic reason for the enrichment. It is a discretionary remedy that will not be imposed without taking into account the interests of others who may be affected by granting the remedy.

27 In the particular circumstances here, Mr. Hoard has not been enriched. He has transferred away a portion of the contracts upon which commissions are based to Ms. Brackley. There is no evidence that Mr. Hoard derived any benefit or "kickbacks" from this transaction. It is Ms. Brackley who has benefitted from the transaction, assuming that the contracts continued to generate commissions and did not terminate or mature. As noted, Ms. Toerper has commenced a fresh action against Ms. Brackley for the return of her share of the commissions from the transferred contracts.

28 Even assuming there has been some gain to Mr. Hoard, the Court of Appeal of Alberta held that where a party to a contract gains by a breach of that contract, that party is not truly enriched, as the breaching party takes that gain subject to its liability for breach of contract: *Luscar Ltd. v. Pembina Resources Ltd.*, 1994 ABCA 356 (Alta. C.A.) at paragraph 117. Here, as recognized by Justice Strehlaf in her reasons assessing Ms. Toerper's breach of contract damages, Mr. Hoard was in breach of the agreements by transferring contracts to Ms. Brackley without Ms. Toerper's consent.

29 Ms. Toerper asserts that Mr. Hoard is being enriched by retaining his share of commissions. Medhurst J. addressed a similar argument in *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1997), 214 A.R. 380 (Alta. Q.B.), aff'd (1998), 216 A.R. 328 (Alta. C.A.). He held that this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the *Bankruptcy and Insolvency Act*. In bankruptcy situations, the creditors who benefit from the failure of a trust claim are not "enriched", but merely recover what they are owed according to the pro-rata distribution requirements set out in the *Bankruptcy and Insolvency Act*. The Court in *McKinnon, Re* also makes this point.

30 Even if it could be argued that Mr. Hoard's unsecured creditors have been enriched by the ongoing receipt of commissions, there is no corresponding deprivation vis-à-vis Ms. Toerper regarding those commissions. Her deprivation is in regard to the subject of the transfer to Ms. Brackley. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2007 BCSC 808 (B.C. S.C.) underlines the need for the correspondence between the two. Quite simply, Ms. Toerper is seeking to dip into other funds in Mr. Hoard's estate to compensate for her possible loss in regard to the contracts transferred away. I say "possible" because there is no evidence before the court that Ms. Brackley has received commissions in regard to these transferred contracts. To the extent that Mr. Hoard's estate continues to receive certain commissions from transferred contracts, Ms. Toerper remains entitled to half of those net amounts and has not been deprived of these, albeit given the intervention of the bankruptcy, the payments are not as prompt as she would like.

31 Further, there is a juristic reason for any enrichment. Mr. Hoard and Ms. Toerper agreed that each of them is entitled to 50% of the net commissions. The operation of the *Bankruptcy and Insolvency Act* and its system of pro-rata distribution constitutes another juristic reason which precludes the imposition of a constructive trust: *Bassano Growers Ltd. v. Price Waterhouse Ltd.* at paragraph 19.

32 In addition, as noted in *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73 (Ont. C.A.), while a constructive trust, if appropriately established, could have the effect of the beneficiary receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. Here, the imposition of a constructive trust might be a fair result as between the Mr. Hoard and Ms. Toerper, but it would be unfairly detrimental to Mr. Hoard's other unsecured creditors.

33 In summary, the requirements of imposing a constructive trust on the basis of unjust enrichment are not made out in this case.

Wrongful conduct

34 The Supreme Court held in *Soulos v. Korkontzilas* that a constructive trust can also be used to right wrongful conduct, if the following conditions are met: the bankrupt must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands; the property in the hands of the bankrupt must be shown to have resulted from deemed or actual agency activities of the bankrupt in breach of his equitable obligation to the claimant; the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the bankrupt remain faithful to their duties; and there must be no factors that would render the imposition of a constructive trust unjust in all the circumstances.

35 Decisions subsequent to *Soulos v. Korkontzilas* emphasize that the property sought to be impressed with the trust must be the property obtained through the wrongful act: see for example, *Ontario (Director, Real Estate & Business Brokers Act) v. NRS Mississauga Inc.* (2003), 40 C.B.R. (4th) 127 (Ont. C.A.); *Credifinance Securities Ltd., Re*, 2011 ONCA 160 (Ont. C.A.).

36 As recognized by Justice Strehkaf in her 2011 reasons in regard to a similar transfer by Mr. Hoard to Ms. Brackley without Ms. Toerper's consent, these further transfers to Ms. Brackley are plainly a breach of the parties' contract.

37 The trustee takes no issue with treating this as a breach of an equitable obligation.

38 However, the property that Ms. Toerper is seeking to assert a proprietary interest over has not been generated by this breach. The wrongful conduct is not in regard to property in Mr. Hoard's hands — it has gone to Ms. Brackley. Mr. Hoard's share of the ongoing commissions derived from non-transferred contracts are payable to his trustee post-bankruptcy, and divisible between Mr. Hoard and Ms. Toerper pursuant to their agreements. There is some evidence that indicates that Mr. Hoard also continues to receive certain commissions from transferred contracts. Those commissions cannot be said to result from the wrongful transfer, but rather, they continue to be received in spite of the wrongful transfer. Ms. Toerper remains entitled to her share of those commissions pursuant to her agreements with Mr. Hoard.

39 Ms. Toerper's proprietary remedy lies with Ms. Brackley and cannot be realized by accessing Mr. Hoard's share of the ongoing commissions. Ms. Toerper has commenced an action against Ms. Brackley in this regard and is not left without a remedy. She would prefer that she not have to proceed in this fashion, which will take some time and money, but would rather have access to Mr. Hoard's portion of ongoing commissions to the exclusion of the other unsecured creditors.

40 To manufacture a proprietary interest in favour of Ms. Toerper in Mr. Hoard's share of post-transfer commissions in these circumstances would not be fair and just vis-à-vis the other unsecured creditors.

41 The trustee reviewed the transfers to Ms. Brackley and concluded that there were not sufficient resources in the estate to properly prosecute the action. Given the additional benefit to Ms. Toerper of an action against Ms. Brackley, the trustee asked Ms. Toerper to consider contributing to the costs of recovery, consistent with its responsibility to all unsecured creditors. She has not been willing to do so.

42 The trustee has thus reasonably concluded that there are insufficient resources and potential return to the estate for the benefit of all creditors to pursue the action. He has offered it up to creditors pursuant to section 38, at their own cost and for their own benefit. Ms. Toerper is free to make an application in this regard.

43 In summary, Mr. Hoard's transfer of a portion of the contracts to Ms. Brackley does not give rise to a constructive trust in Mr. Hoard's share of commissions post-transfer.

Conclusion

44 Ms. Toerper's appeal from the trustee's rejection of her proprietary claim is dismissed. Costs may be spoken to if necessary.

Appeal dismissed.

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